IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| ALFRED ESTRADA | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| STUART L. TRAGER, M.D., P.C. | : | NO. 01-4669 |

MEMORANDUM

Dalzell, J. September 10, 2002

Plaintiff Alfred Estrada is a deaf individual who alleges that he made an appointment with defendant Stuart Trager, M.D., P.C., to treat his injured ankle but Dr. Trager refused to provide him with a sign language interpreter in violation of Title III of the Americans with Disabilities Act and Section 504 of the Americans with Disabilities Act. Before us is Trager's motion to dismiss based on the expiration of the statute of limitations.

## I. Background and Procedural History

Estrada commenced this action with a pro se complaint on September 13, 2001.[1] Trager moved to dismiss. Before disposing of the motion, we referred Estrada to counsel, and then granted Estrada leave to file an amended (counselled) complaint. The amended complaint was filed on March 12, 2002, and alleges the facts we now summarize.

[1] Although the complaint was not docketed as filed until September 14, 2001 when we granted plaintiff's motion to proceed in forma pauperis, for statute of limitations purposes the complaint was filed when plaintiff filed the motion for leave to proceed in forma pauperis. Urrutia v. Harrisburg County Police Dep't, 91 F.3d 451, 457 n.8 (3d Cir. 1996).

A. Amended Complaint

Alfred Estrada has been deaf from birth. He uses American Sign Language, which is his first and most proficient language, to communicate. Am. Compl. at ¶¶ 2, 27.

On July 8, 1999, Estrada injured his ankle and went directly to Graduate Hospital. Graduate Hospital diagnosed him with a torn ligament, fitted him with a temporary cast, gave him crutches, prescribed pain medication, and referred Estrada to Dr. Trager, an orthopedist and the defendant here. At Estrada's request, Graduate Hospital made the appointment with Dr. Trager for 2:00 p.m. the next day. Id. at ¶¶ 8-10.

The complaint then alleges in some detail that Dr. Trager refused to provide a sign language interpreter at the appointment, despite Estrada's repeated requests for one, and notwithstanding Estrada's having informed Dr. Trager[2] that he needed the aid of a qualified interpreter in order to communicate effectively about his sprained ankle. Estrada also faxed Dr. Trager materials "explaining federal disability law and outlining Dr. Trager's obligations under Title III of the Americans with Disabilities Act," id. at ¶ 17. Id. at ¶¶ 11-17.

When it became clear that Dr. Trager would not change his mind and provide an interpreter, at 1:00 p.m. on July 9, 1999, Estrada decided not to honor the appointment. He instead made an appointment with another area orthopedist who would

[2] By means of a relay telephone service for the deaf.

provide an interpreter. That appointment was scheduled for 9:40 a.m. on July 14, 1999. Id. at ¶¶ 17-19.

On these alleged facts, Estrada asserts claims under Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act") and Title III of the Americans with Disabilities Act ("ADA"). He requests compensatory damages for the pain of delayed medical treatment and emotional suffering, punitive damages, declaratory relief, and an injunction directing Dr. Trager to "modify his ongoing policy and practice of refusing to provide interpreters to patients so that it provides for an individualized inquiry into reasonable accommodation for individuals with hearing disabilities." Id., Parts V-VII.

B. Motion to Dismiss

Trager moves to dismiss under Fed. R. Civ. P. 12(b)(6) based on the statute of limitations. While he acknowledges that the ADA and Rehabilitation Act do not supply a statute of limitations, Trager submits that the statute of limitations for personal injuries under Pennsylvania law applies. That statute of limitation is two years. Since Estrada was injured on July 8 and July 9, 1999, and the action was commenced on September 13, 2001, Trager contends that the complaint is time-barred.

Estrada responds that the two-year statute of limitations for personal injuries in Pennsylvania does not apply and that a longer time period controls. He adds that even if a two-year statute of limitations does control, his complaint is

not time barred because it alleges a "continuing violation" that lasted into the statute of limitations period. He also invokes equitable tolling.

We examine the parties' arguments in this Memorandum.

II. Standard of Review

In considering a motion to dismiss, a court must accept the facts alleged in the complaint as true and all reasonable inferences that can be made from them. Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990). We may dismiss a complaint "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). A court may adjudicate statute of limitations on a motion to dismiss if the complaint reveals on its face that it has not been filed within the statute of limitations. Bethel v. Jendoco Constr. Corp., 570 F.2d 1168, 1174 (3d Cir. 1978).

In responding to the motion to dismiss, Estrada's counsel[3] attaches Estrada's affidavit and other documents. This raises the question of whether to convert Trager's motion to dismiss into one for summary judgment.

[3] We are grateful to the University of Pennsylvania Law School Legal Clinic for accepting our referral here. Specifically, we salute the excellent work of students Heather Harkulich, Andrew C. Hyman, William B. Monahan and Jeffrey W. Rubin on Estrada's behalf, under the supervision of Louis S. Rulli and Lawrence J. Schempp, Esqs.

Certain documents Estrada presents are within our purview on a motion to dismiss. These include the complaint Estrada filed with the Pennsylvania Human Relations Commission (Estrada Aff., Ex. A) and the letter of the Commission stating its findings after investigation (Estrada Aff., Ex. C). We may consider these documents without converting the motion to dismiss into a motion for summary judgment. Pension Benefit Guaranty Corp., 998 F.2d 1192, 1196 (3d Cir. 1993) (concluding that matters of public record may be considered on a motion to dismiss).

The other document and the affidavit itself will convert the motion to dismiss into one for summary judgment, if we rely on them. Fed. R. Civ. P. 12(b). It is in our discretion whether to rely on them or not. Id.; 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1366, at 491 (2d ed. 1990). Because in our circuit a court must notify the parties before converting a motion to dismiss into a motion for summary judgment, In re Rockefeller Ctr. Properties, 184 F.3d 280, 287-88 (3d Cir. 1999), and because plaintiff objects to conversion at this juncture, we will not rely on them, and will construe Trager's motion according to Rule 12(b)(6) standards.

## III. Discussion

### A. What is the Statute of Limitations?

We first must decide what statute of limitations controls, since neither the ADA nor the Rehabilitation Act contains a statute of limitations.

When there are gaps in the federal statute -- i.e., where the cause of action does not provide all necessary rules of decision -- a federal court looks to state law. Hardin v. Straub, 490 U.S. 536, 538 (1989); Regents v. Board of Tomanio, 446 U.S. 483-85 (1980). This choice-of-law principle is embodied in 42 U.S.C. § 1988[4], which applies by reference to Estrada's ADA claim, and in federal common law. Wilson v. Garcia, 471 U.S. 261, 266-67 (1985). We "borrow" the statute of limitations for the most analogous state law claim unless doing so would be inconsistent with federal law. Goodman v. Lukens Steel Co., 482

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[4] Section 1988 provides, in relevant part,

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes...shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause....

42 U.S.C. § 1988(a).

U.S. 656, 660-64 (1987); Wilson, 471 U.S. at 266-68; Tomanio, 446 U.S. at 488.

In Goodman v. Lukens Steel Company, 482 U.S. at 660-62, the Supreme Court borrowed the statute of limitations for personal injury as the most analogous state law claim to a claim of racial discrimination under 42 U.S.C. § 1981. In Lake v. Arnold, 232 F.3d 360, 364, 368 (3d Cir. 2000), our Court of Appeals borrowed the statute of limitations for personal injury for a 42 U.S.C. § 1985(3) discrimination claim. In so doing, the Court of Appeals stated, "In determining which state limitations period to use in federal civil rights cases, we look to the...statute of limitations for personal injury actions." Id. at 368.

Estrada's Rehabilitation Act and ADA claims -- which seek to vindicate the right of disabled people to equal access to places of public accommodation and sound in disability discrimination and civil rights -- are most closely analogous to the state law claim of personal injury. Thus, the statute of limitations for personal injury controls. Accord Susavage v. Bucks County Schs. Intermediate Unit, No. 00-6217, 2002 U.S. Dist. LEXIS 1274, at *61 (E.D. Pa. Jan. 22, 2002); Jones v. Commonwealth of Pennsylvania Dep't of Welfare, 99-4212, 2000 U.S. Dist. LEXIS 107, at *6 (E.D. Pa. Jan. 5, 2000); Wesley v. Vaughn, No. 99-1228, 1999 U.S. Dist. LEXIS 18098, at *8 (E.D. Pa. Nov. 18, 1999); DeAngelis v. Widener Univ. Sch. of Law, No. 97-6254, 1998 U.S. Dist. LEXIS 317, at *4-5 (E.D. Pa. Jan. 14, 1998). In

Pennsylvania, that statute of limitations is two years. 42 Pa. C.S.A. § 5524(2).

Estrada makes two arguments for why a limitations period other than the two-year statute of limitations should control. First, he asserts that the four-year statute of limitations which Congress established in 28 U.S.C. § 1658 applies by reference to his ADA claim. Second, he ventures alternatively that the common law doctrine of laches, rather than a statute of limitations, may be borrowed as the timeliness principle. While creative, these arguments do not withstand scrutiny.

Section 1658 fashions a statute of limitations for federal causes of action not having one. "It did not, however, establish a new, nationally uniform federal statute of limitation for all federal causes of action." Zubi v. AT&T Corp., 219 F.3d 220, 223 (3d Cir. 2000). Section 1658 only applies to causes of action arising under statutes enacted after § 1658's enactment date, December 1, 1990: it provides, in relevant part, "[A] civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. § 1658. Since the ADA and Rehabilitation Act were enacted before December

1, 1990,[5] § 1658 does not provide the statute of limitations for causes of action arising under their authority.

Estrada contends that because the ADA did not become effective until after December 1, 1990, § 1658 should nevertheless govern his ADA claim. We reject this suggestion, as § 1658 is plain on its face. A court may seldom depart from the plain language of a statute when divining Congress's intent. United States v. Turkette, 452 U.S. 576, 580 (1981); Ross v. HEREIU, 266 F.3d 236, 245 (3d Cir. 2001). Certainly, Congress was aware when it passed § 1658 that the ADA was enacted -- indeed, only a few months earlier -- but was in a dormancy period pending its effective date; if Congress wanted to include the ADA within the scope of § 1658's one sentence statute of limitations, it could easily have done so expressly.

Estrada cites Zubi v. AT&T Corp., 219 F.3d 220 (3d Cir. 2000) for the supposed proposition that § 1658 should be construed in a way to give effect to litigants' settled expectations. He contends that since the ADA was not yet effective when § 1658 was enacted it would not be disruptive to litigants' settled expectations to furnish plaintiffs the four-year statute of limitations. Estrada reads Zubi too broadly. In that case, the Court resolved a patent ambiguity[6] in § 1658. It

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[5] Specifically, the Rehabilitation Act became law on September 26, 1973, 29 U.S.C.A. § 794 (1999), and the ADA on July 26, 1990, 42 U.S.C.A. § 12101 (1995).

[6] To wit, whether 42 U.S.C. § 1981, which was passed (continued...)

did not give courts license to inquire into the "expectations" of defendants when the meaning of the statute is clear on its face.

Estrada makes the alternative argument that we may adopt laches, instead of the personal injury statute of limitations, as the timeliness principle. As rehearsed, when federal law is silent, we must adopt state law unless inconsistent with federal law or policy. Hardin, 490 U.S. at 538-39; Wilson, 471 U.S. at 266. Section 1988 dictates that we must adopt state "common law, as modified and changed by the constitution and statutes of the State." 42 U.S.C. § 1988(a); Wilson, 471 U.S. at 267. We may not pick and choose what state law we like. The Supreme Court has cautioned that state statutes of limitations are intertwined with tolling and accrual rules and that courts should be hesitant to "unravel state limitations rules." Hardin, 490 U.S. at 539. "By adopting the statute governing an analogous cause of action under state law, federal law incorporates the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action." Wilson, 471 U.S. at 271. We may only depart from the state statute of limitations and associated tolling rules if applying the state rules would defeat federal law or policy. Hardin, 490 U.S. at 538-39, 543. While Estrada may be right that the flexible

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[6](...continued)
before December 1, 1990, but amended after December 1, 1990, was "enacted" before or after December 1, 1990 under § 1658. Id. at 222.

doctrine of laches[7] would promote policies behind his disability discrimination claims, he does not suggest that borrowing a statute of limitations would be inconsistent with federal law in that it would frustrate any federal policy or goal.

Consequently, we must borrow the two-year statute of limitations for personal injury in Pennsylvania and Pennsylvania's associated accrual rules.

[7] "Laches is an equitable doctrine which precludes a party from pursing a complaint when it is guilty of a lack of diligence in asserting its rights, such that the passage of time has caused prejudice to the opposing party." In re Iulo, 766 A.2d 335, 338 (Pa. 2001).

B. When did the statute of limitations start to accrue?

In Pennsylvania, the statute of limitations begins to run when the cause of action accrues, which is "as soon as the right to institute and maintain a suit arises." Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983), quoted in Bradley v. Ragheb, 633 A.2d 192, 194 (Pa. Super. 1993). "The statute of limitations begins to run 'from the time the cause of action accrued,'...when 'the first significant event necessary to make the claim suable' occurs." Lake, 232 F.3d at 366. In a claim of personal injury, the cause of action accrues on the date the injury is sustained. Bradley, 633 A.2d at 194. Because Estrada was injured on July 9, 1999, but did not file suit until September 13, 2001, his complaint is untimely.

Estrada contends the complaint states a continuing violation. A continuing violation renders a complaint timely if any act that is a part of the continuing violation took place in the statute of limitations. See Nat'l R.R. Passenger Corp. v. Morgan, __ U.S. __, 122 S. Ct. 2061, 2074 (2002); Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 482, 481 (3d Cir. 1997). Estrada points to such averments in the complaint as "Upon information and belief, Dr. Trager's refusal to provide interpreters to disabled patients who need qualified interpreters to communicate effectively is an ongoing policy and practice," Am. Compl. at ¶ 21, and "Dr. Trager is in violation of Title III of the ADA because [of] his ongoing policy and practice of

refusing to provide interpreters to patients who have disabilities and who need qualified interpreters to communicate effectively...," id. at ¶ 29. Estrada argues that because Trager's refusal to provide a qualified interpreter is part and parcel of a policy that persists to the present day, the complaint states a continuing violation, and timely challenges the failure of Trager to provide him an interpreter on July 9, 1999.

Allegations in the complaint that Trager has an ongoing policy of refusing to provide disabled patients sign language interpreters are of no moment in this individual action. The complaint does not allege that Estrada was denied a sign language interpreter after July 9, 1999. The complaint does not even suggest that Estrada had an appointment to see Dr. Trager after that day. More broadly, Estrada's contention proves too much: were the fact of a plaintiff's injury because of a policy that is still in place enough to state a continuing violation, the statute of limitations would become a dead letter. The Pennsylvania statute of limitations begins to run on the date the plaintiff himself is injured.

Further, the complaint does not plead a continuing violation. The continuing violation theory -- which deems a complaint timely if any act which constitutes the continuing violation took place within the statute of limitations -- is peculiar to claims that are by their very nature patterned and durational. Nat'l R.R., 122 S. Ct. at 2073-75. Where the

continuing violation doctrine applies, the illegal practice complained of has materialized or become cognizable as such only over time.[8] Id. In contrast, here Estrada's rights under the ADA and Rehabilitation Act ripened on July 9, 1999, when Dr. Trager refused his request for an interpreter. Since Trager's refusal to provide Estrada an interpreter was a "discrete discriminatory act[]," id. at 2072, rather than an illegal practice which took place over time, the continuing violation doctrine does not apply.

Estrada's complaint is untimely because it was not filed by July 9, 2001. The only remaining avenue that might save

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[8] Both National Railroad and Rush dichotomize between discrete discriminatory acts and continuing violations. See National Railroad, 122 S. Ct. at 2072 (stating that "discrete discriminatory acts are not actionable if time barred, even if they are related to acts alleged in timely filed charges"); Rush, 113 F.3d at 483-84 (noting "discrete instances of alleged discrimination that are not susceptible to a continuing violation analysis"). The gist of the difference is that a continuing violation by its "very nature involves repeated conduct." Nat'l R.R., 122 S. Ct. at 2073. The hostile work environment sexual harassment claim deemed actionable as a continuing violation in National Railroad and Rush is "comprised of a series of separate acts that collectively constitute one unlawful employment practice." Nat'l R.R., 122 S. Ct. at 2074 (quotations omitted). "The unlawful employment practice...cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." Id. at 2073 (quotations omitted). Here, the violation of Estrada's rights happened on a single day, July 9, 1999. Regardless of how systematic the discriminatory practice may have been or how many other patients Dr. Trager may have denied a sign language interpreter, the violation against Estrada was completed on July 9, 1999. It is a discrete and unambiguous discriminatory practice that Estrada had the opportunity to challenge immediately. It is thus not susceptible to continuing violation analysis.

Estrada from the two-year time bar is equitable tolling, which he also invokes.

C. Equitable Tolling

"Equitable tolling functions to stop the statute of limitations from running where the claim's accrual date has already passed." Oshiver v. Levin, 38 F.3d 1380, 1387 (3d Cir. 1994).

We briefly note an issue the parties have not discussed, which is whether we even have the discretion equitably to toll. Equitable tolling -- as opposed to, say, the discovery rule -- is not a doctrine that is available under Pennsylvania law, see Lake, 232 F.3d at 367-70, and, as discussed, we must apply Pennsylvania tolling rules unless inconsistent with federal law. Hardin, 490 U.S. 538-39; Lake, 232 F.3d at 370.

Putting aside this threshold difficulty, we also do not believe we may resort to federal equitable tolling because, even assuming it is available, there is no warrant for it here.

Courts may equitably toll the statute of limitations "only when the 'principles of equity would make the rigid application of a limitation period unfair.'" Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999). To preserve the integrity of statutes of limitations, it is sparingly applied. Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236, 239 (3d Cir. 1999). "The [equitable] tolling exception is not an open-ended invitation to the courts to disregard limitations periods simply

because they bar what may be an otherwise meritorious cause. We may not ignore the legislative intent to grant the defendant a period of repose after the limitations period has expired." Sch. Dist. of Allentown v. Marshall, 657 F.2d 16, 20 (3d Cir. 1981). "Equitable tolling is appropriate in three general scenarios: (1) where a defendant actively misleads a plaintiff with respect to her cause of action; (2) where the plaintiff has been prevented from asserting her claim as a result of other extraordinary circumstances; or (3) where the plaintiff asserts her claims in a timely manner but has done so in the wrong forum." Lake, 232 F.3d at 370, n.9.

Estrada asserts that the last of these three tolling exceptions applies. Specifically, he maintains that he has timely asserted his rights but did so in the wrong forum. He refers to a complaint he filed with the Pennsylvania Human Relations Commission (PHRC) on March 14, 2000 complaining of the same conduct he alleges here. But the equitable tolling exception does not apply for the simple reason that the PHRC complaint was not filed in the "wrong" forum. The PHRC had jurisdiction and venue to hear Estrada's claim. It had the power to grant him relief.

Additionally, the Rehabilitation Act and Title III of the ADA impose no requirement of administrative exhaustion. See Freed v. Consolidated Rail Corp., 201 F.3d 188, 194 (3d Cir. 2000) (Section 504 of Rehabilitation Act); Moyer v. Showboat Casino Hotel, 56 F. Supp. 2d 498, 501 (D.N.J. 1999) (Title III of

ADA). The pendency of the PHRC action did not prevent Estrada from filing a complaint here.[9] See Calter v. Henderson, No. 99-5736, 2001 U.S. Dist. LEXIS 19187, at *15 (E.D. Pa. Nov. 26, 2001) (holding that pursuit of relief in union arbitration does not provide exceptional grounds to toll the statute of limitations for filing a complaint with the EEOC).

Estrada requests that if we deny equitable tolling we should nevertheless allow him to conduct discovery before deciding that his complaint is time-barred. But since we do not deny Estrada's request for equitable tolling based on the insufficiency of the evidence, but rather because the facts alleged are insufficient as a matter of law, discovery would here be unavailing. In any event, equitable tolling addresses the circumstances affecting a plaintiff's capacity to file a timely action, and plaintiff needs no discovery about what he experienced and knew.

Because Estrada's complaint is untimely and there is no cognizable basis for equitable tolling, the statute of limitations bars this action. We shall therefore dismiss the complaint.

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[9] Our Court of Appeals has not ruled on whether a Title III ADA plaintiff must exhaust administrative remedies, and there is some authority from other Courts for the proposition that such a plaintiff must, e.g., Burkhart v. Asean Shopping Ctr., Inc., 55 F.Supp.2d 1013, 1015-19 (D. Ariz. 1999); Snyder v. San Diego Flowers, 21 F.Supp.2d 1207, 1210 (S.D. Cal. 1998). But even if Estrada believed he must exhaust administrative remedies the PHRC action was terminated on November 17, 2000, giving him nine months in which to commence an action here.

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ORDER

AND NOW, this 10th day of September, 2002, upon consideration of the defendant's motion to dismiss the amended complaint, plaintiff's response thereto, and defendant's reply thereto, and in accordance with the foregoing Memorandum, it is hereby ORDERED that:

1. The motion to dismiss the amended complaint (Doc. No. 19) is GRANTED;

2. The amended complaint is DISMISSED WITH PREJUDICE; and

3. The Clerk shall CLOSE this case statistically.

BY THE COURT:

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Stewart Dalzell, J.